

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5453**

1. Opening of Meeting:

The Appeals Board convened at 10:30 a.m., February 9, 2005 in Orange County, with Chair Cynthia K. Thornton presiding.

2. Roll Call: Members

Present

Absent

Cynthia K. Thornton, Chair

X

Ann M. Richardson, Vice Chair

x (via phone)

Virginia Strom-Martin

X

Jack Cox

X

Don L. Novey

x (via phone)

3. Approval of the Minutes:

The January Board meeting minutes were approved by all members.

4. Chair's Report:

Chair Thornton reported that she testified before the Little Hoover Commission regarding the Governor's reorganization plan for boards and commissions on January 27, 2005. The Little Hoover Commission has asked for additional information which will be provided. Chair Thornton thanked Ralph Hilton and Mary Walton-Simons for compiling the additional information. She also thanked Vice Chair Richardson and Member Strom-Martin who assisted in sorting the information and compiling it in a readable format. Chair Thornton also reported that she and Chief ALJ Jay Arcellana attended the enrobing ceremony in Pasadena.

Chair Thornton also reported that the Board is sending a letter of support to the Senate Rules Committee for former Appellate Operations ALJ Lilian Shek who was appointed to the Public Employees Relations Board.

5. Board Member Reports:

Member Strom-Martin commended Chair Thornton on her testimony before the Little Hoover Commission.

Vice Chair Richardson apologized for not attending the Board meeting in person, saying she had an ear infection that prevented her from flying. Vice Chair Richardson agreed with Member Strom-Martin, stating that Chair Thornton did a terrific and exemplary job in her testimony before the Little Hoover Commission.

6. Chief Administrative Law Judge/Executive Director's Report:

Chief ALJ/Executive Director Jay Arcellana reported that he has been negotiating for quite some time now with the Labor Agency regarding both our annual judicial conference and the annual support staff conference. He stated he is pleased to announce that he has verbal approval for the judicial conference, to be held toward the end of summer in Long Beach. A formal package will be submitted to Labor Agency this week.

The support staff conference is planned sometime in May or June this fiscal year. The initial response from the Labor Agency is 'maybe'. Labor Agency has asked for more documentation and background material, which Mary Walton-Simons has already prepared and sent to Agency. Chief ALJ/Executive Director Arcellana will meet with Agency later this week, and if approval is granted, the Northern portion of the conference will be in Oakland, and the Southern portion of the conference in Long Beach. Chief ALJ/Executive Director Arcellana commented that this is welcome news for the agency for several reasons, one of which is that it shows that the doors of communication between CUIAB and the Labor Agency are open to discuss important issues.

Chief ALJ/Executive Director Arcellana also reported that he and some members of Senior Staff met with the Department of Personnel Administration this past week. It was primarily a meeting to get to know each other and sort out some relationships and issues that will come before the Agency. It was a good meeting and they are very supportive of us and what we are trying to accomplish.

Chief ALJ/Executive Director Arcellana reported that CUIAB will be represented at the CUIC annual training conference later this week by PALJs Tim McArdle and Zaida Hackett.

Chief ALJ/Executive Director Arcellana also noted in this past month we had a very nice retirement dinner for Mike DiSanto and Ricardo Munoz in Los Angeles, with approximately 125 to 150 staff in attendance. It has been quite a while since we have gotten together as an agency for a social function. Ricardo Munoz, became a Grandfather for the first time in January, but his mother passed away yesterday and the services will be tomorrow. Chief ALJ/Executive Director Arcellana asked that we keep Ricardo in our thoughts and prayers.

In response to Board Member Strom-Martin's inquiry, Chief ALJ/Executive Director Arcellana reported that there has not been an ALJ conference for the past two years. Member Strom-Martin commented that approval of a conference for this year is especially good news.

7. Branch Reports:

a. Chief ALJ/Executive Director Jay Arcellana reported that Zaida Hackett took over as PALJ in Los Angeles this month, and Eleanor Nisperos will be starting in Oxnard in the middle of the month. In the interim, Tim McArdle has been acting PALJ in Oxnard. Chief ALJ/Executive Director Arcellana thanked them for their efforts.

Chief ALJ/Executive Director Jay Arcellana reported that the Board is going to close its hearing facility in Riverside and combine that with the hearing facility in San Bernardino. This will be more cost effective, provide a better facility, and we will be able to put some support staff out there for the Judges.

PALJ Gil Knipe, who had a heart attack last month, returned to work yesterday.

Chief ALJ/Executive Director Jay Arcellana reported that the news on workload is good. For the first time in three years the workload is manageable; we should have sufficient staffing levels to liquidate the workload in a timely fashion without continuing stresses on the system. We are current with our typing and verifications, and our open balance is down to about seven weeks. The optimal level is around four weeks. The case age in the field, 37 days, is wonderful, particularly given the workload and everything we have been going through lately. With respect to unemployment insurance cases over 90 days, we are at just 6% that are over 90 days, which is remarkable considering we were at 21% in December. As to Disability Insurance, we are at 10%, down from 11% last month. Accordingly, and after much discussion and debate about the workload, tax cases, and retirements, a memorandum will be issued this week announcing reduction of the case load by one more case for the field judges, bringing us back to our previous case load standard. We have not been at that level for over two years.

Finally, Chief ALJ/Executive Director Jay Arcellana reported that the ALJ II exam should go forward by the end of this month, thanks to hard work by PALJ Tim McArdle and Deputy Director Pam Boston.

b. Deputy Chief Administrative Law Judge, Appellate Operations, Julie Krebs, reported that in January 2005 Appellate Operations registered 1413 cases and closed 1597, so closures exceeded registrations by 13%, which is very good news. We are working hard to reduce our inventory. Inventory is currently at 2616 cases, down significantly since last July, when it was 3105. We are not quite at the point where we are able to reduce ALJ case load assignments as in the field, but we should be there by April or May. Registrations are approximately 11% below the fiscal year average, but it's too early to tell if that is a trend.

Deputy Chief ALJ Krebs also reported another oral argument has been scheduled for the April 13 Board Meeting in Los Angeles. Again, this will be a tax status case.

Chair Thornton commended ALJ Emma Castillo for doing an excellent job preparing them for the last oral argument and expressed her appreciation for the extra work AO performed on handling the oral argument.

c. Deputy Director, Administrative Services Branch, Pam Boston was not able to attend the February Board Meeting because of a personal matter, so Chief ALJ/Executive Director Arcellana gave her report. Deputy Director Boston, Chief ALJ/Executive Director Arcellana and her staff have been going over the usual plans for closing out this current fiscal year. The biggest issue confronting us right now is facilities, particularly in San Francisco. The landlord for the San Francisco Office has advised that they will no longer negotiate, so we have approximately just nine months in which to find another location. The difficulty was because of the State's ADA requirements. The problem with the office is that it has an underground parking structure which is eight inches too low under ADA requirements. A waiver was granted for other state agencies, but we have been unable to secure a similar waiver. The Department of General Services, which negotiates on our behalf, is apparently not as flexible on these matters. The problem is that any new facility will cost more than three hundred thousand a year, which means we will need to go through the Department of Finance for approval. To date, we have been successful in keeping it under that threshold level. San Jose and Fresno offices are also in the soft term of their leases, so we will also need to deal with those two offices. We are looking to a larger site for Fresno, but we are not sure what we are going to do with San Jose. Oxnard is in a situation now where they are still in a lease term, but we are looking for a larger facility. If this year is difficult, then next year will be even more difficult, given anticipated budget issues. We are very disappointed about the San Francisco lease. Those of you that have been there know that it is a wonderful facility and it's going to be hard to replace.

Chair Thornton: Observed that the San Francisco facility is a wonderful facility at a good price and close to public transportation and it's a shame the State couldn't see its way to obtain a waiver and approve a lease extension.

d. Deputy Director, Planning and Program Management, Mary Walton-Simons reported on two items: Yesterday Administrative Services managers and Planning and Program Management managers had a meeting for the first time. The purpose of the meeting was to streamline our processes so that the supervisors would be able to access information more quickly and understand the processes more easily. We have compiled a subject matter list for the Bench. All a supervisor has to do is type in, for instance, an illness injury report, staff report, inventory/workload report, and it will immediately go to the name of the Branch contact person, the phone number and the e-mail address so that the contact person will be immediately apparent to any supervisor trying to figure out in the myriad of things that we do. When asked whether the list was available to all employees or just managers Deputy Director of Planning and Program Management Mary Walton-Simons responded that viewing rights have not been discussed yet. However, there shouldn't be anything confidential on there. The second step in that process

will be to meet with the supervisors and discuss what we are proposing in order to ensure we are being responsive to the original request that was made at the Legal Support Supervisor II meeting in December.

The second item is to recognize Michelle Robinson's work on the Agency's Information Security Policy, which she will be presenting later today. That effort included a year and a half of negotiating with two unions.

8. Chief Counsel's Report:

Chief Counsel Ralph Hilton commented briefly on the litigation and the workload reports before the Board members. (See attachments A and B). On litigation front five new cases were served on us last month, and no cases were closed. Regarding the Board members' workload, as you can see, Priscilla Peluso puts forth her very best effort every month to make certain that everyone shares in the joy of the cases. Accordingly, each and every one of you had 525 cases last month.

Board Member Strom-Martin recognized Priscilla Peluso pointing out that she does a phenomenal job arriving to work at six in the morning.

9. Unfinished & New Business:

a. Title 22 CCR Section 5065--Proposed Amendments

Chief Counsel Ralph Hilton stated that this item was presented at the last Board Meeting, and at Member Novey's request we tabled voting on the proposed amendments so that Board Members had time to review them in more detail. There is one possible change from the last meeting, as per Member Richardson who would like to see the credibility rationale set forth in the "Reasons for Decision." When a factual determination is based upon the credibility of a witness, under the current regulation the rationale is set forth in the "Statement of Facts." However, pursuant to DOL guidelines and our experience with the quality ratings, they prefer the rationale be set forth in the "Reasons for Decision" rather than the "Statement of Facts." The purpose of this amendment is to bring our regulations in line with what Department of Labor has requested of us in the decisions.

It was moved by Member Strom-Martin and seconded by Member Cox that section 5065 of Title 22 of the California Code of regulations be changed as set forth by Chief Counsel Hilton.

Vice Chair Richardson objected that the language as set forth is confusing. There is a decision subsumed within the entire written decision and I think that needs to be clarified. So maybe up at the top where it says Section 5065 it should say written decision and then the first paragraph should say the Administrative Law Judge shall issue a written decision as specified below, and then set forth what should be contained within that written decision. Then I think there would be no ambiguity as to what decision means.

Chief Counsel Ralph Hilton: Ok, I'm not following exactly what your concern is. Is your concern that the decision could be interpreted to be as something other than the written decision?

Vice Chair Richardson: There is a section for decision within the entire written decision that we serve. So it's ambiguous as to what decision we're referring to. And what we're referring to is of course the decision that is subsumed within the original written decision with it containing all of the above, The Statement of Facts, the Reasons for Decision, the issues of credibility, and then finally the decision. So we've got decision written in so many meanings, so many different things within the lines of the statute. So what I was proposing was that section 5065 be entitled "Written Decisions" and then say the Administrative Law Judge shall issue a written decision as specified below and then set forth what that written decision shall contain. Does that make sense? If nobody else thinks there is an ambiguity or that that's unclear let me know. But I think that we're not clear about which decision we're referring to.

Chief Counsel Ralph Hilton made two clarifications: first, this section relates to field office decisions, not decisions issued at your level, the appellate level.

Second, right now the way the amendments are written we can get them through in an expedited fashion as a non-substantive change to the regulation. If we make too many changes to the regulation, then we are going to have to go through the extenuated regulation process which will take anywhere between eight to twelve months. So what I'm saying is, unless you feel that these changes, these additional changes are critical, it would be preferable, at least from the point of view of getting this into effect right away, to go with the less extensive regulation changes.

Chair Thornton suggested that these small changes be made prior to making the larger changes that Vice Chair Richardson discussed.

The motion carried unanimously and the Chair thanked Chief Counsel Hilton for his work on the regulation.

b. Michele Robinson, the designated Information Security Officer with Planning and Program Management for CUIAB, reported on the adoption of the information security policy, first giving a brief overview of the policy.

As part of the information security awareness program, Planning and Program Management Branch led the development and vetting process for two new policies. Our vetting process and negotiations over the past year and a half are complete. The first policy in the package is the information security policy. Its purpose is to ensure that all of our employees are aware of their role and responsibility with securing CUIAB's information assets. Those very important assets include the personal information of our clientele and our employees. The second policy is the internet/e-mail policy. This policy ensures our employees know their responsibility and the risks associated with use of those tools. Both of these policies work hand and hand to support our information security program and

minimize risk and potential liability to the Agency. Finally, the policy package was vetted through the unions, and both CASE and CSEA have agreed to their implementation. We finally reached an agreement with them both in late December. Once adopted by the Board, I can begin training the employees and roll out the policies with the mandatory training.

The information security policy is a requirement under the Information Practices Act, Civil Code section 1798.20, which requires every state agency to establish rules of conduct for the use of personal information and to also train employees about their responsibility and the use.

Member Strom-Martin pointed out that the proposed policy says that employees may use the CUIAB e-mail system for personal use on a quote, "minimal and incidental basis." How is that determined? What exactly does that mean?

Michele Robinson responded that CUIAB would employ the same standard for any other equipment that it has like the telephone. Where it is not incurring additional expense to the State, it's not interfering with an individual's ability to perform their work timely, then it would probably be considered minimal and incidental. Ultimately, these would need to be evaluated on a case by case or a situational basis.

Chair Thornton: For example if one of our employees wanted to check their e-mail on a break on a State computer, would this be considered incidental?

Michele Robinson responded that if an employee surfs the internet all day, allowing their work to pile up, then that obviously falls way outside the bounds of minimal and incidental.

Chief Counsel Ralph Hilton reported that the term "minimal and incidental" is one of those terms of art in the law, like "reasonable person." Everything should not be defined in black and white terms, so there must be a provision to cover those situations. A certain amount of personal use of the State telephone is a fact of daily life and we aren't capable of identifying each and every instance that it is or is not going to be allowed, so there must be a term like that. It is admittedly somewhat subjective, but it is a term not just used by us but by all state agencies. I believe if you looked at other agreements and policies established by other agencies, you will find the same term.

Michele Robinson agreed that this is a term that is now being used in some of the bargaining unit contracts.

Chair Thornton commented that if there is a problem with inappropriate internet usage, if it's a clear cut example one way or the other, if it's clearly incidental it'll be no problem. If it's clearly abusive, it'll be no problem. The problem is going to be where it's a wobbler and that would be a problem anyway. I don't think you could get around that.

Chief Counsel Ralph Hilton: Yes, I would agree.

Michele Robinson: Well, and I think the supervisors would be working with their labor relations person as they would any work issue and going through the progressive discipline process.

Vice Chair Richardson: So when do IT or the Chair or the Board have the authority to review internet and e-mail usage? I mean who has the authority to monitor it I guess?

Chair Thornton: Well, it's our job as the board to set policy and that's what we are being asked to do here. In terms of monitoring it, it would fall to individual supervisors and go up through chain of command and ultimately end up on Ralph's lap.

Chief Counsel Ralph Hilton: And to monitor on an ongoing basis we normally have to give notice that we are going to do that.

Vice Chair Richardson: It did say on an ongoing basis but how about at all?

Chief Counsel Ralph Hilton: Well, I'm going to distinguish ongoing monitoring from a situation where we have information that somebody is engaged in some wrongful conduct. Then without notice we can go in and look at the history of their usage and see what's going on. Obviously you don't want to give notice in that situation because then you allow them the opportunity to cover their tracks, and so in those circumstances we can do it without notification to them and the policy provides for that.

Michele Robinson: Well I was just going to say, you know, that in reality and what employees need to be made aware of is that your network administrators (IT folks) see what comes across. Anyway, so, you need to be aware that if you're using it for personal use, it's not private. There have been cases where e-mail has been subject to subpoena and where employees have asked whether they can redact their personal e-mail or separate their personal e-mail. And the answer was no.

Chair Thornton: Even if you can physically redact personal e-mails, they are still in our system somewhere, so e-mails are forever.

Michele Robinson: We plan to make that part of the training so that employees are aware of this.

Vice Chair Ann Richardson: asked whether anyone has the authority to just randomly access e-mails.

Chief Counsel Ralph Hilton: The answer is no. In order to look at somebody's e-mail, it would have to be approved at the highest levels of the agency. Jay, or myself or the Board.

Chair Thornton: There would have to be cause for it. Accessing e-mail randomly would not be permissible under the policy. The policy provides that there must be cause, that is that there must be some legitimate information, some reason to believe there's been an abuse of the policy.

Michelle Robinson: And it goes to that need to know so even our IT Administrators, you know, they have to have job related or need to know so in that case, let's say Ralph, if his work with Labor Relations and a supervisor are monitoring an employee, then there is a specific request and a process for that.

Vice Chair Richardson: Senator Bowen had carried legislation for three separate years to address situations where someone's internet/e-mail or work e-mail was being monitored, and I wanted it clarified what approach CUIAB was taking to this.

Chair Thornton and Member Strom-Martin commended Michele Robinson for an excellent presentation and long months of development. The policy is excellent.

It was moved by Member Strom-Martin and seconded by Member Cox that the internet policy be approved.

The motion carried unanimously.

c. Presiding Administrative Law Judge Tim McArdle followed-up on a report he gave at the December Board meeting on converting from recording hearings by tape recorder to recording them digitally. We are considering this change for four basic reasons. First, the clarity of the recording; second, the ease of retrieval of the recording and third, the ease of storage. Most importantly, because of the rapid obsolescence of tape recording equipment; also, the sixty thousand dollars we spend to buy tapes every year that may not be available to us for a whole lot longer. It is a necessity that we move in this direction. The entire digital recording system would overlay our current HUB system by which the judges dictate their decisions to the central file server. We tested three modes of recording last week using four judges. One was a self-contained hand-held device. It has about five hours of internal memory and it has a memory chip that has an additional ten hours of memory. We tested recording over the telephone, using the speaker phone and recording directly into the file server. We also testing recording through a personal computer. All three modes are viable. They all worked well. The ALJ's found them easy to work with. We used non-technically literate ALJ's to test this, to make sure that it was usable for all of us. Also, we tested the ease of use at the Appellate Office, and the recordings were extremely clear and very easily retrieved. They all have their strengths and weaknesses. The hand held I believe is the most problematic because if a judge is going to a remote location and going to record a week's worth of hearings, fifteen hours might not be enough. Also, there is no way to input data at the beginning of the hearing and it must be uploaded onto a PC at the completion of the hearing. It takes a long time to upload, up to an hour for a day's worth of hearings. The judge would have to enter the data, the case number and the ALJ number. We believe that the hand held was problematic for use in recording hearings except for maybe specialized situations. With the telephone, it

was also easy to use. The judge only has to enter three prompts at the beginning of the hearing and then the phone does the rest. The problem with the telephone is that in many locations we don't have conference telephone capability. We have to conference in the file server, then if we have parties appearing by telephone such as witnesses or parties or we have language line, interpreting by telephone, we need telephone conferencing capabilities at these locations. That brings us to the PC. The PC worked quite well. There is no problem with down loading. The ALJ only has to enter two fields on the screen: the ALJ number and the case number. The PC does the rest. The quality of the recording there is also excellent. The ease of use is good. The problem with the PC's is we don't have them in co-located facilities. Places like Hollister and Gilroy for example where we share facilities with the local Chamber of Commerce and an EDD co-located facility such as Roseville which is a busy hearing site for us. Now, we can either revisit that policy, especially in EDD facilities, or perhaps use a combination of telephones and PC's to record the hearings. It would be preferable to just use one methodology but we may have to use two.

Chair Thornton: Could we use a lap top or a telephone line in those situations?

Presiding Administrative Law Judge Tim McArdle: We didn't test lap tops but we should be able to do that.

Chair Thornton: Would that solve the problem in places like Hollister and Gilroy?

Presiding Administrative Law Judge Tim McArdle: I don't know. I can't answer that.

Chief ALJ/Executive Director Jay Arcellana: The use of lap tops at that level with the amount of use that would be required, would be cost-prohibitive.

Presiding Administrative Law Judge Tim McArdle: There are a couple of things that we haven't tested yet. All of the testing we did took place at Venture Oaks and the tests with the telephone also included a judge who was doing nothing but telephone hearings so he was able to conference three parties, the two parties and then the server, and it worked fine. We have not tested it outside of Venture Oaks until today and two judges in Oxnard, as we speak, are testing recording by telephone. And we also have not tested the capacity of our system. If we have one hundred hearings simultaneously, and we are feeding them all into the server, we don't know if our system is up to that. We are going to conduct further tests in the coming month, and as I told you last December in my report, we hope to have a full blown pilot project going in one or more offices by mid summer.

Chair Thornton: Are you leaning towards a mixture of the hand-held and the computers now?

Presiding Administrative Law Judge Tim McArdle: I would prefer using strictly the PC. Just having the judges know one system and how to work one system. I think the PC is the most viable. Another downside of the phone hearings is that the

telephone recording is on our contract with MCI, which specifies that we pay three cents for every minute of recording. That sounds real reasonable but at about a dollar a hearing and over one hundred and forty two thousand hearings last year, suddenly you are looking at a very significant cost item. So I really believe that the PC is the way to go.

Chair Thornton: Have you thought about addressing options in the remote locations and the shared facilities where we don't have the PC's?

Presiding Administrative Law Judge Tim McArdle: No I'm afraid in those situations we may have to use a hand held or a telephone. Either one. But in the really small locations, we seldom go there more than one day per week. I'm talking about places like Fort Bragg, Lake Port, Gilroy, so the hand held might be viable for places like that.

Chair Thornton: And what was the down side of the hand held?

Presiding Administrative Law Judge Tim McArdle: The fact that we can't input the fields for recording so we have to do it afterward at the end of the day. And so then we would have the problem of matching up the case files, case numbers with the recording and the possibility of losing that memory chip. If we happen to lose that memory chip or the hand held then we haven't just lost one hearing, we have lost a whole day's worth of hearings.

Chair Thornton: There was also that capacity issue.

Presiding Administrative Law Judge Tim McArdle: Up to fifteen hours, it probably isn't enough for a full week if we are using it a remote facility for a full week.

Chair Thornton thanked Presiding Administrative Law Judge Tim McArdle for his report.

10. Public Comment:

There was no public comment.

11. Closed Session:

The regularly scheduled Board meeting adjourned, and the Board went into closed session. No votes were taken on any matters in closed session.